



Order 98-12-23

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SERVED: Dec 16 1998

**D STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 16th day of December, 1998

**DELTA AIR LINES, INC.
And
AEROVIAS DE MEXICO, S.A. de C.V.**

for exemptions under 49 U.S.C. Section 40109
and Statements of Authorization under 14 CFR
Part 212 (U.S.-Mexico)

**Docket OST-97-3289
and Undocketed**

ORDER GRANTING AUTHORITY IN PART

Summary

By this order, we grant the joint motions of Delta Air Lines, Inc., and Aerovias de Mexico, S.A. de C.V. (Aeromexico), filed September 11, and September 15, 1998, in Docket OST-97-3289, for certain exemption authority and statements of authorization to the extent necessary to expand the carriers' code-shares services in the U.S.-Mexico market, to include services between 12 U.S. points and Monterrey, Mexico, via Atlanta, Georgia. We continue to defer action on the remainder of the application filed December 29, 1997, for blanket code-share authority in the U.S.-Mexico market.

Motions/Responsive Pleadings

On September 11, and September 15, 1998, Delta and Aeromexico filed joint motions for immediate action concerning discrete portions of their joint application for blanket U.S.-Mexico code-share authority dated December 29, 1997. The motions request immediate action

to authorize expanded Delta/Aeromexico code-share services between Monterrey, Mexico, and the following 12 U.S. cities: Boston, Charlotte, Chicago, Cincinnati, Detroit, Raleigh/Durham, Greensboro, Nashville, New York, Newark, Philadelphia, and Washington, D.C (via Atlanta, Georgia).

Specifically, the carriers' request that Aeromexico be granted exemption authority to provide scheduled foreign air transportation of persons, property, and mail between Monterrey and the 12 named U.S. points, and that Delta be granted a Statement of Authorization to display Aeromexico's "AM" designator code on flights operated by Delta between Atlanta and the 12 cities, for the carriage of Aeromexico's traffic moving between Monterrey and the 12 named U.S. points.

On November 5, 1998, Delta and Aeromexico filed a joint supplemental motion for immediate action, stating that further delay in granting the requested authority would imperil the continuation of the Monterrey-Atlanta services. In support, the carriers state that, in July 1998, the Department authorized Aeromexico to carry Delta's code between Monterrey and Atlanta which enabled Aeromexico to initiate nonstop service on the route on September 1, 1998, and that Aeromexico made a substantial financial commitment to lease two MD-82s for service on the route. Delta/Aeromexico state, however, that the market is a relatively thin Origin and Destination city-pair, dependent upon flow traffic from other U.S. points to sustain the nonstop service. The carriers state that, because of these circumstances, beyond-Atlanta traffic support is critical to the economic viability of the Monterrey-Atlanta operation previously authorized by the Department, and that, without the authorization for the requested code-share services, Aeromexico will need to reduce or discontinue the Atlanta-Monterrey service. The carriers maintain that termination of the service would reduce, by one-third, the U.S. gateways readily accessible to travelers between the United States and Monterrey, as well as other points in northern Mexico, and "eliminate the best gateway to and from the Eastern U.S." ¹

American Airlines, Inc. and Aero California S.A. de C.V. (Aero California), filed joint answers, opposing the September 11, September 15, and November 5, motions, and Delta/Aeromexico filed joint replies to all answers.²

American/Aero California state that the Government of Mexico continues in large measure to refuse to authorize the American/Aero California code-share arrangement because it would increase competition against the Cintra Group (the government-controlled parent of Aeromexico and Mexicana). They also argue that, while the United States and Mexico met in January 1998 to resolve the code-share concerns between the two countries, and that Mexico promised to respond to the United States' code-share liberalization proposals, no acceptable code-share arrangement has been reached. American/Aero California maintain that, as long as the Department continues to give away extrabilateral rights to Mexican carriers for codesharing,

¹ Supplemental motion at 5.

² American accompanied its answer to the September 11 application with a motion for leave to file late. We will grant the motion. Delta accompanied its replies of September 23, and October 1, 1998, with motions for leave to file otherwise unauthorized documents. We will grant the motions.

the Government of Mexico will have no incentive to liberalize its restrictive policy. In this case, American/Aero California argue that Delta/Aeromexico are asking the Department to bail them out of a situation in which Aeromexico initiated its Atlanta service before it received Department approval to code-share in markets that it now claims are essential to the service. In these circumstances, American/Aero California urge the Department to continue to defer action on the applications, consistent with recent Department policy, until the Mexican Government addresses this matter in a constructive manner.

In their reply, Delta/Aeromexico state that American/Aero California have provided no basis for denial of the motions for immediate action in this case, and that the Department should continue to consider U.S.-Mexico code-share requests on a case-by-case basis. They recognize that the United States and Mexico are engaged in discussions toward liberalization of the code-share regime and express their full support for those efforts. They contend, however, that due to the exigent circumstances requiring immediate action to forestall termination of an existing service, their application should be granted.

Decision

We have decided to grant the Delta/Aeromexico September 11, September 15, and November 5, motions for authorization of U.S.-Monterrey code-share services for a limited period, subject to certain conditions normally imposed on U.S.-Mexico code-share authorizations. The authority will be effective immediately through January 31, 1999.

Currently, there are no specific provisions in the U.S.-Mexico aviation agreement governing code-share operations. Both governments have approved limited code-share services on the basis of comity and reciprocity. In light of U.S. carrier interest in serving the market, however, the United States has supported a more liberal regime for code-share services and made proposals to the Mexican Government designed to establish such a regime. Because of lack of progress in obtaining a liberal arrangement, we have been reluctant to approve new and expanded code-share operations, and have deferred action on a number of applications in this regard.

Discussions toward a more liberal code-share regime will resume in late January 1999. We believe that these talks could resolve a number of issues and thereby facilitate expanded code-share operations in the U.S.-Mexico market by the various interested U.S.-Mexico carrier code-share partnerships.

American and Aero California have made persuasive arguments supporting our continued deferral of applications for additional code-share operations pending those discussions. However, we believe, based on the specific circumstances presented here, that the public interest supports a limited exception in this case.

We reach this conclusion in recognition that in deferring action on pending requests, it was never our intent to affect adversely existing services that we had already found to be in the

public interest. In this connection, we have continued to renew existing code-share operations throughout the period in questions. Delta and Aeromexico have persuasively demonstrated that approval of their limited request is necessary to ensure continued operations of their Atlanta-Monterrey service, a service that we previously approved and that the carriers are currently operating.

Against this background, we find that it is in the public interest to approve the carriers' requests. However, consistent with the discussion above, we are making our approval effective through January 31, 1999, while we pursue our negotiations with Mexico on a more liberal code-share regime. We will review the issue of continuing this authority in light of progress achieved in those negotiations.

ACCORDINGLY,

1. We grant exemption authority under 49 U.S.C. 40109 to Aerovias de Mexico, S.A. de C.V., to provide scheduled foreign air transportation of persons, property, and mail between Monterrey, Mexico, and Boston, Charlotte, Chicago, Cincinnati, Detroit, Raleigh/Durham, Greensboro, Nashville, New York, Newark, Philadelphia, and Washington, D.C. (via Atlanta, Georgia);
2. We grant Delta Air Lines, Inc., a Statement of Authorization under Part 207 of the Department's regulations to enable Delta to display Aerovias de Mexico, S.A. de C.V.'s "AM" designator code on flights operated by Delta between Atlanta and the following 12 U.S. points: Boston, Charlotte, Chicago, Cincinnati, Detroit, Raleigh/Durham, Greensboro, Nashville, New York, Newark, Philadelphia, and Washington, D.C., for the carriage of Aeromexico's traffic moving between Monterrey and the 12 named U.S. points;
3. The authority granted in paragraph 1, above, shall be effective immediately and shall remain in effect for one year from the service date of this order;
4. The authority granted in paragraph 2, above, shall be effective immediately and shall remain in effect through January 31, 1999, provided that the carriers' underlying authority to serve the markets at issue remains in effect, and that the underlying code-share agreement remains in effect, and approved by the Department;
5. Grant of this authority is limited to code-share operations conducted by Delta and Aeromexico;
6. The code-share operations authorized here for Delta and Aeromexico are subject to the following additional conditions:
 - (a) The code-sharing operations conducted under this authority must comply with 14 CFR 399.88 and with any amendment to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the

requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (i.e., the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; that the passenger liability of the operating carrier be unaffected;

(b) The authority granted here is specifically conditioned so that neither Delta nor Aeromexico shall give any force and effect to any contractual provisions between themselves that are contrary to these conditions; and

(c) Authorization of the code-share services may be withdrawn in any U.S.-Mexico city-pair where another U.S. carrier proposes to operate services with its own aircraft (direct carrier services), and (1) additional designations are not available to authorize the proposed direct carrier service; and (2) the Department determines that the proposed direct carrier services would provide benefits and service options superior to the code-share operations in the market;

7. We grant the joint motions of Delta and Aeromexico, and of American and Aero California for leave to file unauthorized documents in Docket OST-97-3289;
8. To the extent not granted, we defer action on all other requests in Docket OST-97-3289;
9. We may amend, modify, or revoke the authority granted at any time without hearing; and
10. We will serve this order on American Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; Aero California, S.A. de C. V.; Aerovias de Mexico, S.A. de C.V.; Compania Mexicana de Aviacion, C.V. de S.A.; the Ambassador of Mexico in Washington, D.C.; the Federal Aviation Administration; and the U.S. Department of State (Office of Aviation Negotiations).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://dms.dot.gov/general/orders/aviation.html>*